



December 15, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D. C. 20554

Re: Annual Assessment of the Status of Competition in the Market for the
Delivery of Video Programming, MB Docket No. 05-255

Dear Ms. Dortch:

On December 7, 2005, Daniel Brenner, NCTA Senior Vice President for Law and Regulatory Policy, Michael Schooler, Deputy General Counsel, Loretta Polk, Associate General Counsel and Gregory Klein, Senior Director of Economic and Policy Analysis met with Jordan Goldstein, Senior Legal Advisor to Commissioner Michael J. Copps and Rudy Briocche, Legal Advisor to Commissioner Jonathan S. Adelstein, regarding the annual inquiry on the status of competition in the market for the delivery of video programming (also known as the annual Video Competition Report).

In addition to reviewing the points made in NCTA's comments and reply comments, we discussed Section 612(g) of the Communications Act, which provides that "at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of those households, the Commission may promulgate any additional rules necessary to provide diversity of information sources." 47 U.S.C. § 532(g). The question arose as to whether the benchmarks in section 612(g) have been met. As we explained to the Commission in last year's Video Competition proceeding, the first prong of the test – the availability of cable systems with 36 or more channels to U.S. households – has been met but the second prong – 70 percent of those households subscribe to cable – has not.¹ In

¹ See Letter from Daniel L. Brenner, Senior Vice President Law and Regulatory Policy, NCTA to Marlene H. Dortch, Secretary, Federal Communications Commission, December 17, 2004, filed in MB Docket No. 04-227.

fact, over the past year, as cable's share of the multi-channel subscriber universe has further declined, the cable industry is farther away from reaching the section 612(g) threshold.

NCTA has again reviewed three independent data sources to determine whether the 70-70 threshold has been met. In addition to analyzing cable system data from Warren Communications, which the Commission has previously relied on in the annual Video Competition Report,² we analyzed data compiled by Nielsen Media Research and Kagan Research LLC. While there is no complete cable system census data source in the industry, these three sources provide significant information on cable subscribers and total homes passed by cable. Based on our analysis of each data source, Warren, Nielsen and Kagan, over 70 percent of U.S. households within the United States are passed by cable systems with 36 or more channels. However, as shown below, the penetration rate for those systems under all three sources is below the 70 percent threshold.

	Warren Communications (Oct 2004) <u>36+ channels</u>	Analysis of Nielsen FOCUS Systems that report all Data N= 6,079 (Dec 11, 2005) <u>36+ Channels</u>	Analysis of Nielsen FOCUS Adjusted to Reflect Systems that did not report Homes Passed Data N= 7,542 (Dec 11, 2005) <u>36+ Channels</u>	Kagan Research (Year End 2005) ³ <u>All Cable Systems</u>
Cable Subscribers	58,177,885	52,612,627	69,205,503	65,400,000
Homes Passed	84,415,707	83,165,258	109,378,332	123,000,000
Cable Penetration as Percent of HP	68.9%	63.3%	63.3%	53.1%

Only the Warren data shows a penetration figure anywhere near the 70% threshold. This is because the Warren data appears to seriously understate the number of homes passed by cable systems with more than 36 channels. Specifically, the Kagan data shows almost 40 million more homes passed than the Warren data. The Nielsen data, when adjusted to take into account data from 1,463 systems that did not return completed questionnaires, shows 25 million more homes passed than the Warren data.⁴

² Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, 20 FCC Rcd. 2755, ¶ 20. (2005).

³ Kagan Research, LLC, Broadband Cable Financial Databook 2005 at 11.

⁴ According to Nielsen FOCUS data, as of December 11, 2005, there are a total of 7,542 cable systems in the United States with a capacity of 36 or greater channels. The Nielsen FOCUS database compiles system data for all cable headends in the United States, but because a certain percentage of systems surveyed return incomplete questionnaires it contains complete data for only 6,079 "36+ channel" systems. Specifically, the Nielsen FOCUS database is missing "Homes Passed" data from 1,463 "36+ channel" systems. These 1,463 systems comprise subscribers totaling nearly 16.59 million. We know the number of subscribers for the smaller group of systems missing information (16,592,876) but we need to estimate the number of "Homes Passed" (which is a larger number) for these systems. To estimate the number of "Homes Passed" for these 1,463 systems, NCTA used the average penetration rate of the 6,079 systems that reported complete data to Nielsen as a proxy. These

In any event, under any of the relevant data sources, the Section 612(g) benchmark on cable penetration has not been met. And in light of the steady growth of cable's competitors in the video marketplace and the continued decrease in cable's share of multi-channel video subscribers, it seems highly unlikely it ever will be.

Nevertheless, even if the cable industry were to reach the Section 612(g) threshold, it is important to point out that the Commission's authority under Section 612(g) is narrowly circumscribed. In particular, the authority to promulgate rules only applies to the rates for leased access channels.

When Section 612 was enacted in 1984, it contained a requirement that cable operators set aside up to 15 percent of their channels for leased access but set no specific limits on the rates that cable operators could charge for leased access. Operators were required only to impose rates, terms and conditions that were not unreasonable – and there was a statutory presumption that rates, terms and conditions set by the cable operator were reasonable, unless shown by clear and convincing evidence to be unreasonable.

As the legislative history makes clear, Section 612(g) was intended solely to authorize the Commission to regulate the rates, terms and conditions of leased access more stringently, and to impose additional procedures for resolving leased access disputes, if the 70 percent benchmarks were met and if such changes were necessary to provide greater diversity of information sources:

At such time as cable systems with 36 or more activated channels are available (*i.e.*, households that are passed by cable) to 70 percent of households in the country, and as these cable systems are actually subscribed to by 70 percent of those households which have availability to them, the FCC is granted authority to promulgate any additional rules necessary to ensure that leased access channels provide as wide as possible a diversity of information sources to the public. Along these lines, the Commission may develop additional procedures for the resolution of disputes between cable operators and unaffiliated programmers, and may provide rules or new standards for the establishment of rates, terms and conditions of access for such programmers.

In terms of developing any new regulations relating to the price charged programmers for the commercial use of channel capacity designated under this section, prohibitions contained in 621(c) and 623(a) relating to rate regulations and other regulatory authority do not operate as constraints on the possible options available to the Commission in adopting any new rules. However, the

systems have a 63.3% penetration rate. So given that "Homes Passed" [X] x "Penetration Rate" [.633] = "Number of Subscribers" [16.59 million], NCTA solved "Homes Passed" and estimates that the 1,463 systems that did not report "Homes Passed" data would pass an estimated 26.2 million homes [26.2 x .633=16.59]. Therefore, the 7,542 "36+ channel" systems serve a total of 69.2 million subscribers [52.6 million (6,079 systems) + 16.59 million (1,463 systems)] and pass 109.4 million homes [83.2 million (6,079 systems) + 26.2 million (1,463 systems)].

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Commission should not see its role as that of a traditional common carrier regulator. In any case, the Commission may not increase the number of channels required to be set aside under this section or preempt any authority expressly granted to franchising authorities under the title.⁵

In the Cable Television Consumer Protection Act of 1992, Congress amended Section 612 to give the Commission immediate authority to impose maximum rates on leased access. 47 U.S.C. 532(c)(4). Under this amendment, the Commission already has most of the authority that Section 612 was initially intended to confer on it in the event that the 70-70 threshold was ever met. Nothing in the 1992 Act or in its legislative history purports to expand the limited scope of that prospective grant of authority.

If you have any further questions, please contact me or others listed above in the NCTA Legal Department.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner

cc: Heather Dixon
Jordan Goldstein
Rudy Brioche

⁵ Report of the Committee on Energy and Commerce, H.R. Rep. 98-934, 98th Cong., 2d Sess. 54 (1984) (emphasis added).